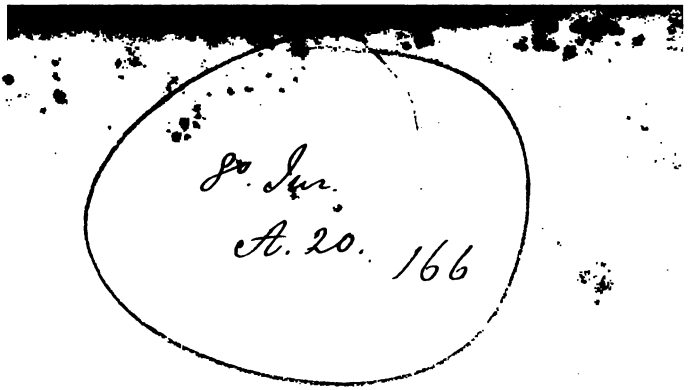

THE ACT

FOR

THE AMENDMENT OF THE LAW

WITH RESPECT TO

WILLS,

(1 VICTORIA, C. 26,)

WITH

Practical Notes and Observations,

AND

A COPIOUS INDEX.

Second Edition;

WITH

AN APPENDIX,

CONTAINING

SUGGESTIONS FOR THE USE OF PRACTITIONERS IN TAKING INSTRUCTIONS FOR AND PREPARING WILLS AND CODICILS,

AFTER THE 31st OF DECEMBER, 1837.

BY R. LUSH, ESQ.

OF GRAY'S INN.

LONDON:

CHARLES READER, LAW BOOKSELLER,

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PREFACE

TO THE FIRST EDITION.

THE following Statute, founded, in a great measure, upon the recommendations of the Real Property Commissioners, is ascribed to the pen of a Noble and Learned Judge, whose long experience and distinguished talents qualify him, in an eminent degree, to deal with this important and difficult branch of law.

A slight perusal of its various clauses will satisfy the reader that much explanation of them is unnecessary. The whole has evidently been penned with great care, and it will probably afford less matter for discussion as to its meaning, than any Statute of equal importance which has passed during the late reign.

Its leading objects are, to give a more efficient testamentary control over property, to relieve the ordinary language of devise from adverse interpretations and presumptions of law, and to lay down settled rules as to the mode of execution, of revocation, and revival of all testamentary dispositions.

The Editor has attempted briefly to point out, under each section, the state of the law at the

present time, and to exhibit the nature and extent of the alteration made by this Act.

The Act had passed the House of Lords, and received, in its principle, the sanction of the House of Commons, when Her Majesty ascended the throne. No alteration has since been made in its details. It may therefore be said to be one, and certainly not the least valuable, of those important reforms in the law which distinguish the reign of William the Fourth.

London, July, 1837.

THE ACT

FOR

THE AMENDMENT

OF THE

LAW OF WILLS.

1 Vic. c. 26.

An Act for the Amendment of the Laws with respect to Wills. [3d July, 1837.]

Meaning of certain words in this Act;

Be it enacted by the Queen's most excellent majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in ex-

"Will:"

ercise of a power, and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service, and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof*, or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled *An Act for taking away the Court of Wards and Liveries, and Tenures* in capite *and by Knights Service*, and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents, and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal, or personal, and to any undivided share thereof, and to any estate, right, or interest (other than a chattel interest) therein; and the words "personal estate" shall extend to leasehold estates and other chattels real, and also to monies, shares of government and other

12 Car. 2, c. 24.

14 & 15 Car. 2, (I.)

"Real estate:"

"Personal estate:"

funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator, and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male. Number: Gender.

II. And be it further enacted, that an act passed in the thirty-second year of the reign of King Henry the Eighth, intituled *The Act of Wills, Wards, and Primer Seisins, whereby a Man may devise Two parts of his Land;* and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled *The Bill concerning the Explanation of Wills;* and also an act passed in the parliament of Ireland, in the tenth year of the reign of King Charles the First, intituled *An Act how Lands, Tenements, &c. may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;* and also so much of an act passed in the twenty-ninth year of the reign of King Repeal of the statutes of Wills, 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5. 10 Car. 1. Sess. 2, c. 2, (I.) Sec. 5, 6, 12, 19, 20, 21, & 22, of the Sta-

tute of Frauds, 29 Car. 2, c. 3; 7 W. 3, c. 12, (I.)

Charles the Second, intituled *An Act for Prevention of Frauds and Perjuries*, and of an act passed in the parliament of Ireland, in the seventh year of the reign of King William the Third, intituled *An Act for Prevention of Frauds and Perjuries*, as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements, or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering, or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled *An Act for the Amendment of the Law and the better Advancement of Justice*, and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled *An Act for the Amendment of the Law, and the better Advancement of Justice*, as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled *An Act to amend the Law con-*

Sec. 14 of 4 & 5 Anne, c. 16.

6 Anne, c. 10, (I.)

Sec. 9 of 14 G. 2, c. 20.

cerning Common Recoveries, and to explain and amend an Act made in the twenty-ninth Year of the Reign of King Charles *the Second, intituled, An 'Act for Prevention of Frauds and Perjuries,'* as relates to estates *pur autre vie;* and also an act passed in the twenty-fifth year of the reign of King George the Second, intituled *An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that Part of* Great Britain *called* England, *and in His Majesty's Colonies and Plantations in* America, except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled *An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestations of Wills and Codicils concerning Real Estates;* and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled *An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will,* shall be and the same are hereby repealed, except so far as the same acts or any of them re-

25 G. 2, c. 6, (except as to colonies.)

25 G. 2. c. 11, (I.)

55 G. 3, c. 192.

spectively relate to any wills or estates *pur autre vie* to which this act does not extend.

All property may be disposed of by will,

III. And be it further enacted, that it shall be lawful for every person to devise, bequeath, or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which if not so devised, bequeathed, or disposed of would devolve upon the heir at law, or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwith-

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

standing that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory, or other future interests in any real or personal estate, whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests, and rights respectively, and other real and personal estate, as the testator may be entitled to

estates pur autre vie;

contingent interests;

rights of entry; and property acquired after execution of the will.

at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

Every person, i. e. having power by law to make a will. This section points to what may be disposed of, not to the persons making a disposition. Idiots, lunatics, and others who, from natural imbecility, old age, sickness, or any other cause, are incapable of managing their own affairs, cannot make a valid will (*a*). Nor can an old man, become so childish, or so forgetful, as not to remember his own name; nor a drunkard, who by excessive intoxication is deprived of the use of his understanding and reason (*b*). A memory sufficient to answer familiar questions is not enough, there must be a disposing mind. "The sane memory for making a will is not at all times when the party can say yea or no, and hath life in him, but he ought to have judgment to discern, and be of perfect memory" (*c*). And a will made under coercion or restraint is void; but no degree of importunity short of that which the testator is unable to resist, and which takes away his free agency, will invalidate a will (*d*). An infant has no disposing mind; but a married woman has, though, generally speaking, not a disposing power (*e*). A person labouring under a delusion on a particular subject has no disposing mind in relation to that subject, though otherwise rational (*f*).

All traitors, felons, and outlaws for felony, are

(*a*) Ex parte Cranmer, 12 Ves. 445.
(*b*) 2 Co. 6—23.
(*c*) Swinburn, 72.
(*d*) Kinleside *v.* Harrison, 2 Phill. 499.
(*e*) Socket *v.* Wray, 4 B. C. C. 486.
(*f*) See Dew *v.* Clarke, Hag. Rep. 1826.

incapable of making a will: but an outlaw for debt may devise his lands, though he cannot his goods, and the lands of a felo-de-se will pass by his will, though his chattels will not.

Which if not so devised would devolve upon the Heir, &c.—A joint tenant therefore cannot sever the joint tenancy by will, any more than he could formerly, though the after-parts of this section enable him to devise his chance of survivorship in the whole, as well as his moiety upon a future severance. Neither can a tenant in tail bar the entail by will.

All real Estate of the nature of Customary Freehold, &c.—Customary freeholds and copyholds were not within the statutes of wills. The former were devisable in many places by virtue of a special custom, and in some instances it appears that copyholds also were capable of direct legal devise by custom. But, generally, the latter could pass only by *surrender to* the use of will, which was the effective instrument, and the want of which was originally fatal to the devise, except where a court of equity interfered, as it was accustomed to do, in favour of wife, children, and creditors (*g*). The statute, 55 Geo. 3, c. 192, above repealed, was passed to supply the want of a surrender, wherever a surrender was a mere form, but it did not apply to cases where there was no custom to surrender to the use of a will, nor did it affect estates of *customary tenure*, though the distinction between these and copyholds is little more than nominal. Besides, there were some customary freeholds which were neither devisable at law nor capable of being conveyed or surrendered to the use of a will (*h*); and it was doubtful whether a custom against a surrender of *copyholds* to the use of will was not supportable(*i*).

(*g*) See Pike *v.* White, 3 B. C. C. 286.
(*h*) Hodgson *v.* Merest, 9 Price, 556.
(*i*) Pike *v.* White, 3 B. C. C. 286.

But though a *surrender* might thus be dispensed with, an *admittance* could not, except in the case of an heir. As the legal estate remained in the surrenderor until the surrenderee was admitted, the latter had nothing to dispose of by his will but the mere *right* to admittance, which could not be devised; and an admittance after the will was made was ineffectual (*k*). The situation of an heir was different, as the estate devolved upon him by operation of law, so that, as before the statute, he might have devised without admittance upon a surrender to the use of will, he could afterwards devise without either admission or surrender (*l*); but neither a devisee nor a purchaser could devise before admittance. Equitable estates, however, in copyholds and customary freeholds, were always devisable.

The present section removes every difficulty in the way of such devises, and makes the testamentary power over property of this description co-extensive with that over every other.

Estates pur autre vie.—These were not affected by the statutes of wills, which treat only of estates in fee simple. Hence, prior to the Statute of Frauds, they were not devisable at all at law, though they were in equity, the legal estate having been vested previously in trustees for the purpose. By the 12th section of the Statute of Frauds it was enacted, that estates *pur autre vie* should be devisable by will to be executed in the same manner as a will of lands in fee simple, but the act did not extend to copyholds.

Contingent, executory, or other future Interests, &c.—It has been for some time settled that contingent interests which are descendible may be devised (*m*), though the opinion formerly was to the contrary (*n*);

(*k*) Phillips *v.* Phillips, 1 Myl. & Kee. 649.
(*l*) Right *v.* Banks, 3 B. & Ad. 664.
(*m*) Perry *v.* Jones, 1 H. Bl. 30.
(*n*) Fearne Cont. Rem. 366, 8th ed.

but if the devisor was not at the date of his will ascertained to be the person in whom the estate would vest, it could not pass by the devise, though the event subsequently happened. As if an estate were limited to two sisters and the survivor of them, and after the death of the survivor to such other person as the survivor may give it by will. While both are living, as it could not be known which would survive, a will made by either would fail, though the party making it afterwards became the survivor (*o*). It may be observed, however, that in such cases the devise would be equally operative by virtue of the power given in the latter part of this section to dispose of after-acquired property, if not by virtue of the 24th section.

Rights of entry could neither be conveyed nor devised (*p*), but must have been taken advantage of either by the party himself or his heirs. "This strange case," says the Master of the Rolls (*q*), "has happened, and may again occur. An estate is vested in one man for his life; the reversion is in another, who may effectually devise it if he pleases. I will suppose him to make his will for that purpose, and to die without knowing that any thing has occurred to prevent its legal operation. Unfortunately, however, the tenant for life, without the knowledge of the reversioner, has done one of the several acts which may in law occasion a forfeiture of his life interest. This act at the same time converts the reversion into a right of entry which is not devisable, and the testator's will as to that estate is wholly frustrated, and this is an evil which the present bill proposed to correct."

And also to such of the same estates, interests, and rights respectively, and other real and personal estate

(*o*) See Lord Langdale's Speech in the House of Lords, February 23, 1837.

(*p*) Goodright *v.* Forrester, 8 East, 564.

(*q*) Speech in the House of Lords, February 23, 1837.

as the testator may be entitled to at the time of his death, &c.—This clause renders the testamentary power complete. After-acquired personal property was always subject to disposition by will, but not after-acquired realty, though it were only the foreclosure of a mortgage (*r*). This rule of law was often productive of great hardship, but the only mitigation a court of equity allowed was, in certain cases, to put the heir to his election (*s*). There was an exception in the case of a copyhold subsequently purchased and surrendered to the use of a prior will (*t*), but then the property passed by the surrender, not by the will, which operated merely as a declaration of uses. (See notes to Sec. 23 and 24.)

As to the fees and fines payable by devisees of customary and copyhold estates.

IV. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will, shall be entitled to be admitted, except upon payment of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of the surrendering of such real

(*r*) Casborne *v.* Scarfe, 1 Atk. 605.
(*s*) Churchman *v.* Ireland, 1 Rus. & M. 250.
(*t*) Att. Gen. *v.* Vigor, 8 Ves. 286.

estate to the use of the will, or in respect of presenting, registering, or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will, shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine, and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees, and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering, or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine, or sums of money due as aforesaid, shall be paid in addition to the

stamp duties, fees, fine, or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

Wills or extracts of wills of customary freeholds and copyholds to be entered on the court rolls;

V. And be it further enacted, that when any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate, it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of

and the lord to be entitled to the same fine, &c. when such estates are not now devisable as he would have been from the

the same real estate, and the lord shall as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent. Heir in case of descent.

V. And be it further enacted, that if no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same Estates pur autre vie.

manner as the personal estate of the testator or intestate.

This is the only section which provides for the case of intestacy.

The 12th section of the Statute of Frauds enacted, that where there was no devise of an estate *pur autre vie*, it should be chargeable in the hands of the heir, if it should come to him by reason of special occupancy as assets by descent; and in case there should be no special occupant, it should go to the executors or administrators of the owner, and be assets in their hands. The clause was silent as to copyholds and incorporeal hereditaments; and as it was considered to have been passed for the purpose of putting an end to general occupancy, it was held not to extend to the former, because there could be no general occupant against the lord (*u*), nor to the latter, because they did not admit of entry, and consequently there could be no title by occupancy. But it was subsequently determined, that where there was no special occupant of an incorporeal hereditament, the estate was continued during the lives for which it was granted, and might be devised; and if not devised, that it went to the personal representative (*x*). No mention was made, however, of executors or administrators as *special occupants*, nor any direction given as to the residue. Hence it was held, that having satisfied debts, the executors were not compellable to distribute the residue as personalty (*y*). This led to the statute 14 Geo. II. c. 20, s. 9, which enacted that estates *pur autre vie*, of which there was no special occupant, if not devised should be applied and distributed as personal estates of the testator or intestate. Still it re-

(*u*) Doe *v.* Martin, 2 W. Bl. 1150.
(*x*) Bearpark *v.* Hutchinson, 7 Bing. 178.
(*y*) Oldham *v.* Pickering, 2 Salk. 464.

mained a question whether, if the estate was *limited* to the executors, &c., as special occupants, they took it for their own benefit, or as trustees for the parties entitled to the personal estate, until the case of Ripley *v.* Waterworth, 7 Ves. 425, decided that it belonged to those who took the personal estate by an equity attaching upon the character of executor as executor.

Both the above-mentioned acts are, as to this subject, repealed. Their provisions are embodied in the above enactment, and extended to every kind of estate *pur autre vie.*

VII. And be it further enacted, that no will made by any person under the age of twenty-one years shall be valid.

No will of a person under age valid;

Though a will of lands made by an infant was void, (34 & 35 Hen. VIII. c. 5, s. 14,) except under a custom, a will of personalty, or of the guardianship of a child, by virtue of the statute 12 Ch. II. c. 24, s. 8, was valid, if made by a person who had attained to an age of discretion. It seems that females were considered to have attained this age at twelve, and males at fourteen; but a contrariety of opinion existed, the testamentary power not being regulated by any statute.

The stat. 12 Ch. II. is not repealed, but as the word "will" is by the first section extended to "a disposition by will and testament or devise of the custody and tuition of any child" under that statute, the power of an infant father to appoint a guardian to his child is taken away.

The law makes no fraction of a day for the purpose of defeating a will. A person born on the 3d September, at eleven at night, who lives till the 2d September, twenty-one years after, and dies at one in the morning, is of age (z).

(z) Raym. 480—1096.

nor of a feme covert, except such as might now be made.

VIII. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act.

A married woman is not under an absolute incapacity to make a will. She has a disposing mind, though, generally speaking, not a disposing power (*a*). With her husband's assent she may make a will disposing of the personal property which originally belonged to her, but the will becomes inoperative if she survive, and it seems he may revoke the consent (*b*). She may also, as executrix, make a will to appoint an executor. With respect to personal property given to her separate use, she is considered as a feme sole, and consequently may bequeath it (*c*), as well as her savings from it (*d*). But the Statute of Wills (34 & 35 Hen. VIII. c. 5, s. 14,) expressly prohibited her from disposing of her lands by will; and this restriction is continued by the above enactment, though she is frequently enabled to do so by wills operating as appointments under powers. And a woman whose husband has abjured the realm, or who has been banished for life by act of parliament, may in all things act as a feme sole.

The stat. 55 Geo. III. c. 192, before referred to, which dispensed with the necessity of surrenders to the use of will, was held not to extend to a surrender for that purpose by a married woman, because *that* was not a *mere form*, as she was subjected to a pri-

(*a*) Socket *v.* Wray, 4 B. C. C. 486.
(*b*) Countess of Portland *v.* Prodgers, 2 Vern. 104.
(*c*) Fettiplace *v.* Gorges, 3 B. C. C. 7; Braham *v.* Burchell, 3 Add. 263.
(*d*) Gore *v.* Knight, 2 Vern. 535.

vate examination (*e*). It seems that this doctrine remains undisturbed. The will of a copyholder, which before operated only as an appointment, will now pass the estate by direct legal devise, but the estate of a feme covert must pass as before by the *surrender*.

Every will shall be in writing, and signed by the testator in the presence of two witnesses at one time.

IX. And be it further enacted, that no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say,) it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

This section introduces an important alteration in the form of testamentary dispositions. A will of personalty may have been made by word of mouth, or by writing without witnesses and without signature. It lay in the discretion of the Ecclesiastical Courts to receive or to reject any document as testamentary. A mere memorandum accidentally left amongst the deceased's papers, might thus have become a part of his will, and if once admitted to probate, its authenticity could not be inquired into elsewhere. A devise of freehold lands, however,

(*e*) Doe v. Bartle, 5 B. & A. 492.

was required to be in writing, attested by three witnesses; a bequest of stock in the funds should have been attested by two (*f*), while copyholds, as well as leaseholds, might pass without attestation or signature. Independent of the litigation produced by the want of some established formula in attempts to set up unauthenticated documents, it was to be lamented that so much confusion and complexity existed in relation to an instrument which should be the least fettered by technical formalities. Some proof of authenticity should be provided, and none is less exposed to fallibility than that which consists in the public recognition of the instrument by its author. But no more ceremonials should be required than are necessary to guard against fraud, and these should be so simple as to be within the capacity of an unlettered man; and so uniform, that he should not be put to inquire, in a moment of exigency, whether this or that mode of authentication is the right one.

The above enactment, it is conceived, is admirably adapted to this end. By requiring all wills to be executed in the same manner, it puts an end to all doubt as to the manner in which a particular will should be authenticated, as well as to the admissibility of the instrument to probate in respect of its form; and the mode of execution by the testator and witnesses is just such an one as would be naturally adopted by a person who knew only that two witnesses were necessary. No form of attestation is required, nor any publication, nor sealing, though the latter was never of any utility, except to satisfy the terms of a power of appointment.

As regards the number of witnesses, it is perhaps, generally speaking, as difficult for two persons to support a confederacy as three; at all events, the inconvenience, if any, that may arise in this

(*f*) See 35 Geo. III. c. 14, s. 16.

respect from limiting the number, is much more than counterbalanced by the additional facility given to the execution.

In writing.]—It makes no difference upon what material, whether parchment or paper, or in what language, or how written, whether in words at length or contracted, or whether the sum be in figures or not, provided there be no doubt or ambiguity (*g*); nor whether it be written with a pencil or ink, so that it clearly appears the testator intended it for his will (*h*); but the *presumption* will be, that pencil writings are merely deliberative, not final (*i*).

It shall be signed, &c.]—The Statute of Frauds also required the will to be signed. It was formerly considered that a sealing by the testator satisfied this requisition (*k*), but according to later authorities (*l*), the legislature meant to require some greater safeguard from fraud than the mere impression of a seal, the identity of which may be itself doubtful, and which may have been put without authority. It was observed by Lord Hardwicke, in Grayson *v.* Atkinson, that some evidence should arise from the hand-writing. But this position has not been adhered to, nor could it, without depriving many persons of the power of making a will. Besides, the signature of another person is made sufficient by the express language of both statutes, by which it would seem, that all the legislature meant to require was the application of the pen as a specific act, serving both as a note of identity, and as an unequivocal symbol of adoption; accordingly the mark of an illiterate person has been held sufficient (*m*).

(*g*) Masters *v.* Masters, 1 P. Wms. 425.
(*h*) Rymer *v.* Clarkson, 1 Phill. 22.
(*i*) Re Applebee, 1 Hagg. 143.
(*k*) See Lemayne *v.* Stanley, 3 Lev. 1; Warneford *v.* Warneford, 2 Str. 764.
(*l*) Grayson *v.* Atkinson, 2 Ves. 459; Smith *v.* Evans, 1 Wils. 313.
(*m*) See Lee *v.* Libb, 1 Show. 68.

And there can be little doubt that the initials of the testator's name would suffice.

At the foot or end thereof.]—The former statute did not direct where the signature should be, and therefore a will written by the testator, beginning "I, A. B." &c. without more, was held good (*n*). It is always advisable, where the will consists of more than one piece of paper, to sign and attest each, but it is not necessary to the validity of the instrument. There must now be a signature at the end; and if any addition be made after signing, but before attestation, the name must be signed again to make that part effective.

Or by some other person in his presence and by his direction.]—Similar words occurred in the Statute of Frauds, but it does not appear that they were ever acted upon. The individual so deputed may, it should seem, be also a witness to the will. Unless he be so, a legacy to him would not be void. The statute does not direct what name he is to sign, but it seems he should put the name of the testator, and state in writing that he does so in his presence, and by his direction.

Made or acknowledged by the testator in the presence, &c.]—This was not required by the Statute of Frauds; and a difference of opinion seems to have been entertained on the question, whether it was necessary that the signature should exist at the time of attestation (*o*), which perhaps this clause was intended to set at rest. If another be deputed to sign for the testator, the authority must be given or acknowledged in the presence of the witnesses.

Present at the same time.]—Under the former statute, if a man published his will in the presence of two witnesses, who signed it in his presence, and a month afterwards sent for a third witness, and published it in his presence, it would have been

(*n*) See Lee *v.* Libb, 1 Show. 68.
(*o*) See Peate *v.* Oughly, Com. 187; also 3 P. Wms. 253.

good (*p*). To satisfy the spirit of this provision, the witnesses should be within sight of each other; all should see the signature, or hear the identical acknowledgment.

The term "credible," which has given rise to so much discussion, is omitted in this enactment; and, as we shall afterwards see, the incompetency of a witness, which was generally understood to be referred to by the term "credible," either at the time of attestation or proof, will not in future prejudice the instrument.

Shall subscribe the will in the presence of the testator.]—A similar clause occurred in the former statute, under which it was held not to be necessary that the testator should see them sign the will, only that he should be so situated as to be able to see them if he would. (*q*) Where the testator desired the witnesses to go into another room, seven yards distant, to attest his will, and there was a window broken, through which he might have seen them, the attestation was held sufficient (*r*). So where he was sick, in bed with the curtains drawn (*s*), or where he could see the witnesses through the window of his carriage, and the attorney's office (*t*). So if he were in such a position that he might, by inclining his head forward, see through the door-way the witnesses in an adjoining room (*u*). But it is otherwise if he could not see them; as where they go down stairs to execute, or if, before they sign, he falls into a state of insensibility, so as not to be conscious of what they are doing (*v*).

(*p*) B. N. P. 263.
(*q*) See Doe *v.* Manifold, 1 M. & S. 294; Todd *v.* Winchelsea, 1 M. & M. c. 12.
(*r*) Shires *v.* Glasscock, 1 Salk. 668.
(*s*) Bac. Ab. Wills (D.)
(*t*) Casson *v.* Dale, 1 B. C. C. 99.
(*u*) Doe *v.* Manifold, 1 M. & S. 294.
(*v*) Cater *v.* Price, Doug. 241.

The witnesses must *attest* and *subscribe* the will. They need not sign more than once, though it consists of many pieces of paper (*x*); but all must be produced to them, or be in the room at the time of execution (*y*), though it will be presumed, in the absence of suspicion, that all were produced. The mark of an illiterate person will suffice (*z*). It does not seem necessary that they should subscribe the will in the presence of each other. If all the witnesses be dead, it will be presumed that they signed in the presence of the testator (*a*), and that he signed in their presence.

It was never necessary that the will should be read over to the testator in the presence of the witnesses, though the former was blind; but it is said that some stronger evidence than the mere attestation of signature would in such case be required (*b*).

No form of attestation, &c.] — The Statute of Frauds directed that the will should be *attested* and *subscribed*, but it was not necessary that such attestation should be stated on the face of the will (*c*), though it was usual to do so. The attestation of an illiterate witness, by making his mark, is a sufficient subscription (*d*).

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

X. And be it further enacted, that no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution

(*x*) Bond *v.* Seawell, 3 Burr. 1773.
(*y*) Lea *v.* Libb, 3 Mod. 262.
(*z*) Harrison *v.* Harrison, 8 Ves. 185.
(*a*) Croft *v.* Pawlett, 2 Str. 1109.
(*b*) Longchamp *v.* Fish, 2 N. R. 415.
(*c*) Vin. Ab. Devise, No. 9.
(*d*) Harrison *v.* Harrison, 8 Ves. jun. 185.

and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

This section supplies all that was necessary to effect a complete uniformity in the mode of passing property by will. It will be immaterial what were the ceremonials prescribed by the instrument creating the power; a will or codicil, well executed as such, will pass the interest; and, on the other hand, the most scrupulous adherence to the power will be ineffectual unless the above requisitions be complied with. Sealing will therefore be quite unnecessary. It will, however, be still advisable to refer to the power, and where it is a limited one, essential in order to *include* in a general devise property over which the power rides, see sect. 27.

Soldiers and mariners' wills excepted.

XI. Provided always, and be it further enacted, that any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his personal estate as he might have done before the making of this act.

Act not to affect certain provisions of 11 G. 4, and 1 W. 4, c. 20, with respect to wills of petty officers and

XII. And be it further enacted, that this act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his majesty King George the Fourth and the first year of the reign of his late majesty King William the Fourth, in-

seamen and marines.

tituled *An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy*, respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty money, and allowances, or other monies payable in respect of services in her majesty's navy.

The statute 29 Chas. II. c. 3, s. 19, to prevent fraudulent practices in setting up nuncupative wills, which it declares to have been "the occasion of much perjury," enacted, that no such will should be good where the estate thereby bequeathed should exceed £30 that was not proved by the oaths of three witnesses at the least, who were present at the making thereof, nor unless it was proved that the testator, at the time of pronouncing the same, did bid the persons present bear witness that such was his will, nor unless it were made in the time of his last sickness and in his habitation, or where he had been resident for the space of ten days or more next before the making of it, except he had been surprised or taken sick away from home and died before his return; and that after six months from the time of speaking the words no testimony should be received to prove it, except the substance had been committed to writing within six days after making the will. But it enacted in words similar to those in the eleventh section, "that any *soldier* being in *actual military service*, or any *mariner* or *seaman being at sea*, may dispose of his *moveables, wages, and personal estate*, as he or they might have done before the making of the act."

But the perpetual impositions practised on petty

officers and seamen in the navy with respect to their pay and prize money, induced the legislature to adopt a new policy, and to divest them of a privilege which, instead of being beneficial, was perverted to purposes the most injurious. Several statutes were accordingly passed from time to time, to impose forms and ceremonials for their protection, the last of which, the 11 Geo. IV. and 1 Will. IV. c. 20, enacts as follows, in regard to the execution of such wills.

That no will made by any *petty officer* or *seaman, non-commissioned officer of marines, or marine,* before his entry into his Majesty's service, shall be valid to pass any wages, prize money, or other monies payable in respect of services in his Majesty's navy; and that no will made or to be made by any petty officer or seaman, non-commissioned officer of marines, or marine, who shall be or shall have been in the naval service of his Majesty, shall be valid or sufficient to pass any such *wages, prize money,* or *other monies,* unless such will shall contain the name of the ship to which the person executing the same belonged at the time, or to which he last belonged, and also a full description of the degree of relationship or residence of the person or persons to whom, or in whose favour, the same shall be made, and also the day of the month and year, and the name of the place when and where the same shall have been executed; nor shall any such will be valid for the purposes aforesaid, unless the same shall, in the several cases hereinafter specified, be executed and attested in the manner hereinafter mentioned, (that is to say,) in case any such will shall be made by any such petty officer or seaman, non-commissioned officer of marines, or marine, while belonging to and on board of any ship of his Majesty as part of her complement, or borne on the books thereof as a supernumerary, or as an invalid, or for victuals only, the same shall be executed in the presence of and

be attested by the captain, or (in his absence) by the commanding officer for the time being, and who in that case shall state at the foot of the attestation, the absence of the captain at the time and the occasion thereof; and in case of the inability of the captain by reason of wounds or sickness to attest any such will, then the same shall be executed in the presence of and be attested by the officer next in command, who shall state at the foot of such attestation the inability of the captain to attest the same and the cause thereof; and if made in any of his Majesty's hospital ships or in any naval or other hospital, or at any sick quarters either at home or abroad, the same shall be executed in the presence of and be attested by the governor, physician, surgeon, assistant surgeon, agent, or chaplain of any such hospital or sick quarters, or by the commanding officer, agent, physician, surgeon, assistant surgeon, or chaplain for the time being of any such hospital ship; or by the physician, surgeon, assistant surgeon, agent, chaplain, or chief officer of any military or merchant hospital, or other sick quarters, or one of them; and if made on board of any ship or vessel in the transport service, or in any other merchant ship or vessel, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain in his Majesty's navy, or some commission officer or chaplain belonging to his Majesty's land forces or royal marines, or the governor, physician, surgeon, or agent of any hospital in his Majesty's naval or military service, if any such shall be then on board, or by the master or first mate thereof; and if made after he shall have been discharged from his Majesty's service, if the party making the same shall then reside in London or within the bills of mortality, the same shall be executed in the presence of and be attested by the inspector for the time being of seamen's wills and powers of attorney, or his assistant or clerk; or if

the party making the same shall then reside at or within the distance of seven miles from any port or place where the wages of seamen in his Majesty's service are paid, the same shall be executed in the presence of and be attested by one of the clerks of the treasurer of the navy resident at such port or place; or if the party making such will shall then reside at any other place in Great Britain or Ireland, or in the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, the same shall be executed in the presence of and be attested by one of his Majesty's justices of the peace, or by the minister, or officiating minister or curate, of the parish or place in which the same shall be executed, or if the party making the same shall then reside in any other part of his Majesty's dominions, or in any colony, plantation, settlement, fort, factory, or any other foreign possession of his Majesty, or any settlement within the charter of the East India Company, the same shall be executed in the presence of and be attested by some commission or warrant officer or chaplain of his Majesty's navy, or commission officer of royal marines, or the commissioner of the navy, or naval storekeeper at one of his Majesty's naval yards, or a minister of the church of England or Scotland, or a magistrate, or principal officer residing in any of such places respectively; or if the party making the same shall then reside at any place not within his Majesty's dominions, or any of the places last mentioned, the same shall be executed in the presence of and be attested by the British consul, or vice-consul, or some officer having a public appointment or commission civil, naval, or military under his Majesty's government, or by a magistrate, or a notary public of or near the place where such will shall be executed, nor shall any will of any petty officer, seaman, non-commissioned officer of marines, or marine, be deemed good or valid in law to any intent or purpose which shall be contained, printed or

written, in the same instrument, paper, or parchment, with a power of attorney; provided always, nevertheless, that if it shall appear to the satisfaction of the treasurer of his Majesty's navy in the case of a will executed on board any of his Majesty's ships, that in the attestation thereof the captain's signature hath by accident or inadvertence been omitted, and that in all other respects the execution has been conformable to the provisions, and to the intent and meaning of this act, it shall be lawful for the inspector of seamen's wills and powers to pass the same as valid and sufficient.

Sect. 49 provides, that wills made by any petty officer or seaman, non-commissioned officer of marines, or marine, while any such person hath been or shall be a prisoner of war, shall be valid, provided it be executed in the presence of and be attested by some commission officer of the army, navy, or royal marines, or by some warrant officer of his Majesty's navy, or by a physician, surgeon, or assistant surgeon in the army or navy, agent to some naval hospital, chaplain of the army or navy, or notary public.

In all other cases such persons may dispose of their personal property by nuncupative wills as before.

Publication not to be requisite.

XIII. And be it further enacted, that every will executed in manner hereinbefore required shall be valid without any other publication thereof.

No alteration in the law is made by this section(*e*). The former statute was silent as to any formal act of the testator to signify his adoption of the instrument, but the practice has been almost universally

(*e*) Mordie *v.* Reid, 1 Madd. 516.

to publish the instrument as the last will and testament of the testator, and the absence of this ceremonial might in certain cases at least have aided a suspicion as to its authenticity. But a delivery of a will as a deed bearing the attestation "sealed and delivered" has been upheld(*f*); so where the testator told the witnesses to "take notice,' and then signed the paper and told them where to sign as witnesses, it was held to be a sufficient execution (*g*). The very act of signing, and causing it to be witnessed, as above stated, is sufficient, without informing the witnesses what the instrument is.

Will not to be void on account of incompetency of attesting witness.

XIV. And be it further enacted, that if any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

The Statute of Frauds required the witnesses to be "credible," but some contrariety of opinion arose as to whether the term "credible" related to the time of attestation, or the time of proof, and whichever opinion prevailed, if the witness was deemed incompetent, the whole will was of course void. This occasioned the statute 25 Geo. II. c. 6, which restored the competency of legatees and devisees, by declaring void all devises and legacies given to attesting witnesses, and thus removing the objections to their competency existing on the score of interest. But the statute only applied to cases where

(*f*) Trimmer v. Jackson, 4 Burn's Ecc. Law, 117.
(*g*) Peate v. Ougley, Com. 197.

the party himself was to receive an immediate benefit from the will. It did not annul an interest derived mediately by operation of law from the devise, and in such cases the objection to his competency went to defeat the whole instrument. Thus where a reversion in fee simple was devised to the wife of the witness, who died during the continuance of the previous estate for life, it was held that the statute did not make void such devise, and the witness being incompetent on account of interest, the will was set aside(*h*).

Besides these, a large class of cases still remained unprovided for, viz., those in which objections to competency were founded on infamy of character, imbecility, unbelief, or any other personal incapacity, which, when established, rendered the attestation a nullity, and defeated the will. The present enactment is intended to remedy these evils, by taking away the legal effect of incompetency in the particular instance. It does not dispense with any of the safeguards before laid down, but only secures individuals from the hardship of being deprived of the benefit intended for them, because the testator was ignorant of the character of those whom he selected for his witnesses, or was unable at the moment to procure others. A will must contain all the requisites pointed out in the 10th section, though it may happen to be the same in respect of proof as though it had not been attested at all. Nor does the enactment at all interfere with the rules of evidence. If the witness was competent at the time of attestation, but incapacitated since, as by having contracted an interest under the will, or by being convicted of an infamous crime, &c., he cannot be heard to prove the execution, but his handwriting must be proved instead. If incompetent at the time, though restored to competency since, it is doubtful whether the at-

(*h*) Hatfield *v.* Thorp, 5 B. & A. 589.

testation is not a nullity. If the other be capable of being produced, he must be called, and must prove that the instrument was duly executed according to the foregoing directions (*i*). If he alone was a competent witness and be dead, disabled, or his absence accounted for so as to let in secondary evidence, his handwriting must be proved; if neither was competent, the handwriting of the testator. In such cases it will be presumed that the execution was properly made, and if the instrument be above thirty years old, it seems that no question as to the competency of the witnesses can arise, though the testator have recently died(*k*).

Gifts to an attesting witness to be void.

XV. And be it further enacted, that if any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift, or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift, or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a

(*i*) See B. N. P. 264.
(*k*) Doe v. Wolley, 8 B. & C. 22, and see 4 T. R. 707.

witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will.

This is an enlarged re-enactment of the statute 25 Geo. II. c. 6, above alluded to, which being passed to explain the 29 Chas. II. c. 3, related only to wills requiring the attestation of witnesses; consequently it did not affect a bequest in a will of personalty only (*l*), an attestation being in such case unnecessary. Therefore a bequest to an attesting witness was not in such case void, nor was the will invalid, only the witness was incompetent to prove its validity. But it was otherwise, if the will contained a devise of lands. The subscription of witnesses being now in all cases necessary, this clause extends alike to all wills. The preceding section preserves the validity of the instrument, notwithstanding the incompetency of the witness, by allowing it to be established by other evidence; this by annulling the particular disposition which creates the interest, restores the competency of the witness. The former simply prevents his disability from defeating the will; this enables him to establish it.

To whose wife or husband.]—These words are new, and were probably suggested by the case of *Hatfield* v. *Thorpe*, above quoted. The former statute was confined to interests derived immediately from the will. It did not extend to those accruing by operation of law; consequently, where the wife was attesting witness, a devise to the husband was not void, and *vice versâ;* and as evidence in favour of the will by the one would be virtually given on behalf of the other, neither could in such case be

(*l*) Emanuel *v.* Constable, 3 Russ. 436.

deemed a competent witness, and the whole will was void. A subsequent marriage between the attesting witness and the legatee does not of course come within this enactment so as to make the legacy void; it only disables the party from proving the execution, and brings the case within the preceding section.

So far only as concerns such person.]—Neither precedent nor ultimate estates therefore are affected by this section. The interest intended to pass by the void disposition, whether real or personal, will now in general go to the residuary devisee or legatee.—See sect. 25.

Creditor attesting to be admitted a witness.

XVI. And be it further enacted, that in case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged, shall attest the execution of such will, such creditor notwithstanding such charge shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

The stat. 25 Geo. II. c. 6, s. 2, enacted "that in case by any will or codicil any lands, tenements or hereditaments, are or shall be charged with any debt or debts, and any creditor whose debt is so charged hath attested, or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil."

Executor to be admitted a witness.

XVII. And be it further enacted, that no person shall, on account of his being

an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

An executor who took nothing under the will, was always held to be a good attesting witness (*m*), and in Lowe v. Jolliffe, 1 Bl. R. 365, an executor in trust, who had acted under the will, was permitted to prove the testator's sanity. So a trustee has been held to be a good witness without releasing (*n*). If the executor, being also an attesting witness, have a legacy left him, the bequest will be void by the 15th sec., and he will be competent to support the will; but if he be not an attesting witness, the bequest will not be affected by that section, and consequently the executor will not be a competent witness for any purpose. The smallest donation, as a ring, or suit of mourning, will, it seems, incapacitate him. But whether admissible as an attesting witness to uphold the will or not, it will not be invalidated by reason of his incompetency.—Sec. 14.

Will to be revoked by marriage.

XVIII. And be it further enacted, that every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the statute of distributions).

(*m*) Bettison *v.* Bromley, 12 Ea. 250.
(*n*) Holt *v.* Tyrrell, 1 Barn. K. B. 12.

It was an established rule of law, that the will of a *feme sole* was revoked by her marriage, because she then ceased to have any controul over her property, and it seems that even an agreement that the will should stand would have had no operation (*o*). On the other hand, the will of the husband was in no respect affected by the *marriage*, though it might have been by subsequent events arising from it, so that whatever portion might have been brought by the wife, she might have been immediately afterwards left destitute by virtue of a will made at a time when no change of circumstances was in the contemplation of the testator.

This salutary enactment defeats all previous dispositions tending to prejudice the new relations acquired by the marriage; but the exception preserves the will where its revocation could not be immediately beneficial to them. It seems that the property must come to the heir or next of kin *in that character*, in order for the marriage to work a revocation of the will; and provided it does so come, the will will be revoked, though no benefit ensued to the new relations. Thus, supposing a testator, having a power of appointment, with a limitation in default to himself in fee, has a son by a former marriage, his second marriage will revoke the will though the son would take the estate. On the other hand, if it were limited over to his eldest child, the will would stand, though he had no child at the time of the marriage. So if the limitation were to all his children.

The question whether the will be revoked or not, must, it seems, depend not solely on the limitations of the instrument creating the power, but the circumstances of the testator's family must be looked at, at *the time of the marriage*. If, for instance, there be a

(*o*) Doe r. Staple, 2 T. R. 684.

limitation, in default of appointment, to a child by a former marriage, or to a stranger, and then upon a given contingency, as death, to the right heirs of the testator, and the child or stranger be living at the time of the marriage, the case will fall within the exception; but not if such individual be dead.

Though the 27th sec. (*infrà*) makes it unnecessary in certain cases to point to the execution of the power in terms, yet to make the appointment subsist after a marriage, it would seem requisite to specify the power, or the property, for though the latter may pass under a general devise or bequest *en masse* with the rest, it could not be excepted from the operation of a marriage on the whole disposition, and the language of both sections seems to require for this purpose a specific execution of the power.

Would not in default of such appointment pass, &c.] —This means, it is conceived, an *immediate devolution* over to the heir or next of kin, and if there be, in default of appointment, an *intermediate* though a *limited* or *contingent* interest to another, provided it be then capable of taking effect, the disposition would not be revoked. *(Supra.)*

No will to be revoked by presumption.

XIX. And be it further enacted, that no will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

The substance of this enactment has been anticipated in part by the one immediately preceding. Notwithstanding the express declarations of the Statute of Frauds, the Courts, though with reluctance, imported from the civil law the doctrine of implied revocations, arising from collateral circumstances. Thus it was held that marriage and the birth of a child amounted to a revocation of a will disposing of the whole of the testator's property.

The ground of this presumption has been considered to be a change of *intention*, but a more satisfactory one seems to be a tacit condition annexed to the will at the time of making it, that it should cease to operate in case of a *total change* in the circumstances of the testator's family. Hence it was immaterial whether the birth of a child happened before or after the death of the testator (*q*). The presumption however was not considered to arise, unless both events, viz., marriage and the birth of a child, concurred; nor unless there was a total disposition of the property, so as to leave both wife and child wholly unprovided for (*r*); and parol evidence has been generally admitted both in the Civil and Ecclesiastical Courts to repel it, though its admissibility was always a subject of doubt.

It is clear that the rule itself, however favorable in particular cases to justice and humanity, depending for its application upon contingencies which might not happen till long after the testator's death, was productive of much inconvenience and mischief; and when it is considered that the principle upon which it was founded, as well as the quality of evidence by which it might be defeated, were unsettled, it cannot be doubted that so fertile a source of litigation loudly called for the veto of the legislature.

It does not appear that any other events than marriage, and the birth of a child, have been considered such a change of circumstances as to amount to a revocation (*s*), and this enactment therefore at first sight seems to have been rendered unnecessary by the one immediately preceding. But we have seen that a limitation to the heir or next of kin of the testator, remote, or contingent upon a limitation to another, does not appear to be within that section, though the contingency happened or the intermediate

(*q*) Doe *v.* Lancashire, 5 T. R. 58.
(*r*) See Kenebel *v.* Crafton, 2 Ea. 530.
(*s*) See Doe *v.* Edlin, 4 Ad. & El. 586.

limitation expired immediately after the marriage; in which case, the subsequent birth of a child might, but for this enactment, have let in the presumption above mentioned.

No will to be revoked but by another will or codicil, or by a writing executed like a will, or by destruction.

XX. And be it further enacted, that no will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner herein-before required, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is herein-before required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

By the Statute of Frauds, the witnesses were required to sign the will in the presence of the testator, though the latter need not have executed it in their presence, but a revocation by writing, not being in nature of a will, must have been signed by the testator in the presence of the witnesses, but it was not necessary that they should sign it in his presence; hence a paper purporting to be testamentary, though containing a clause of express revocation, executed by the testator before three witnesses, but signed by them out of his presence, as it could not operate as a will, neither could it as a revocation, and was a nullity (*t*). The present enactment requiring both to be executed in the same manner

(*t*) 1 P. Wms. 343.

will prevent any such misconceptions, and is a valuable improvement.

Or by the burning, tearing, or otherwise destroying the same.]—The words of the former statute were "*burning, cancelling, tearing,* or *obliterating*," under which the intention to revoke might be inferred by the jury (*u*), or it seems by the court (*x*), from any obliteration, interlineation, or cancellation with the pen. The object of this part of the enactment seems to be to confine the evidence of revocation to acts which go to the destruction of the instrument itself. The only effect of an obliteration will be to annul so much of a disposition as it renders illegible. If therefore a testator draw his pen across the face of the will, or through every line, the will nevertheless stands, unless some other evidence of revocation appear.

It is the *intention* to destroy which the law regards, and which it requires to be *expressed* by one or other of the modes above pointed out. Hence it was never necessary that there should be a complete destruction of the instrument (*y*). Where the testator, having frequently declared himself to be dissatisfied with a will, ordered a person to fetch it, being in bed near the fire, and when it was brought gave it a rent and threw it into the fire, where it would have been burnt had not the person who fetched it taken it off, undiscovered by the testator; it was held to be revoked (*z*). So if there be two parts of a will, and the testator *animo revocandi* destroy one of them, it annuls both (*a*).

But the act of spoliation must reach the instrument itself; it must furnish its own evidence of the fact. In a recent case, it appeared that the testator

(*u*) Titner *v.* Titner, 3 Wils. 503.
(*x*) Winsor *v.* Pratt, 2 B. & B. 650.
(*y*) 2 W. B. 1043.
(*z*) Sir Edward Symons' case, cited Com. 453.
(*a*) Stark. Evid. 926.

threw the will which was enclosed in a sheet of paper into the fire, whence after a scuffle it was rescued by the defendant, who afterwards promised to destroy it, and frequently assured the testator it was destroyed. The cover was burnt at one of the corners, but the will itself was entire. The jury found that the will was revoked. Upon a motion to set aside the verdict, the Court of King's Bench held that there was no evidence of a revocation. The burning of the cover could not be a burning of the will. And Coleridge, J., observed in reference to the argument urged on the motion, how much of a will must be destroyed: "There must be a destruction of so much as to impair the entirety of the will, so that it may be said the will does not exist in the manner framed by the testator. The fire did not touch the will. All that can be urged is, that the destruction was prevented by the fraud of the devisee. Suppose a testator had intended to revoke his will, and was about to sign an instrument of revocation, but was prevented by a third party, could that be said to be a revocation? Good sense requires that we should take the plain words of the statute." (*b*)

With the intention of revoking the same.]—It must always have been shown *quo animo* the spoliation was made, for unless that appears there will be no revocation. If a man, having two wills of different dates, should direct the former to be cancelled, and through mistake the person should cancel the latter, such an act would be no revocation of the last will. Or, if having a will consisting of two parts, he throw one unintentionally into the fire, where it is burnt, it would be no revocation of the devises contained in that part (*c*). Where the testator, under the influence of passion, began to tear his will, but was prevented by the entreaties of the devisee, who had offended him, it was held that the act not being com-

(*b*) Doe *v.* Harris, 1 Nev. & Perry, 405.
(*c*) Worthington's Prec. 498.

plete did not destroy the will (*d*). If a will proved to have been in the testator's possession cannot be found, the presumption is that he has destroyed it, but if it be found, though partly torn or burnt, it must be shown affirmatively that the act was done with an intention to destroy.

If a person has not a disposing mind so that he cannot make a will, he cannot destroy one already made. Hence no act of spoliation done by the testator, while in a state of delirium or insanity, or under restraint or fear, will revoke the will.

No alteration in a will shall have any effect unless executed as a will.

XXI. And be it further enacted, that no obliteration, interlineation, or other alteration made in any will after the execution thereof, shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as herein-before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

(*d*) Doe *v.* Perkes, 3 B. & A. 489.

No obliteration, interlineation, or other alteration, &c. shall have any effect.]—Prior to this statute an interlineation or obliteration was evidence to go to a jury of an intention in the testator to revoke the disposition so altered, though the alteration could not be set up in the case of a devise for want of due attestation. By the present enactment, such alterations, unless attested, are to have no effect at all, so long as the original words can be made out.

A memorandum referring to such alteration.]—It will be sufficient if the testator acknowledge his signature to the memorandum in the presence of the witnesses who subscribe it without reference to the alterations.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

XXII. And be it further enacted, that no will or codicil, or any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner herein-before required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Under the old law, if a person by a second will or codicil revoked a prior will, yet if he kept the same undestroyed, and afterwards cancelled the second, the first was revived. Such at least appears to have been the rule in Courts of Law, though in

the Ecclesiastical Court it has been held otherwise. (*e*) And a presumptive revocation by marriage and the birth of a child admitted of a presumptive revival by the death of the latter. It is probable that in a great majority of cases of presumptive revival, the intentions of the deceased were frustrated by the rule of law, particularly when made to depend on other presumptions. Thus if it appeared that a second will had been executed, and that after execution it remained in the custody of the testator, but on his death could not be found, a presumption arose that he had destroyed it, and then the former will was revived. The present statute takes away all presumption in so important a matter as the setting up or annulling a will.

Re-execution.]—The testator, it seems, must sign it again. The acknowledgment of the former signature before fresh witnesses would not be strictly a re-execution.

Partly revoked, and afterwards wholly revoked, &c.]—If a codicil made to revoke a disposition in the will be subsequently destroyed, the original disposition is not revived, and if the testator afterwards marry, or if he make a new will, and then, having destroyed the latter, simply re-executes the original will, it revives only so much as was not covered by the codicil.

Such a re-execution should express the date, and how much was intended to be revived.

An instrument, whether a will, codicil, or paper of revocation, once completely executed, will operate to annul a prior will, though it be destroyed the moment afterwards.

XXIII. And be it further enacted, that no conveyance or other act made or

A devise not to be rendered in-

(*e*) Hamrod *v.* Goodsign dem. Rolfe, 1 Cowp. 87; Moore *v.* Moore, 1 Phil. 375, 406; Horton *v.* Head, 3 Phil. 26.

operative by any subsequent conveyance or act.

done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

Before this statute, if the testator, subsequently to the making of his will, parted with the specific estate he had at the time of disposing of it, or had even contracted to part with it, the will was revoked. As at the time of the inception of the will, he must have been seised of the estate he devised, so the law required that such estate should remain in him unaltered and uninterrupted to the time of its consummation by his death (*k*). At law a conveyance in fee, though for a special and limited purpose, as a mortgage (*l*), a recovery, the limitations being to the old uses (*m*), a feoffment to the use of the devisor in fee (*n*), or any other act which destroyed the identity of the thing devised, operated as a revocation of the devise. The same effect was given to an act which merely indicated an intention to make a different disposition; an imperfect conveyance, as a feoffment without livery (*o*), a grant of a reversion without attornment (*p*), an appointment

(*k*) See Rose *v.* Griffiths, 4 Burr. 1960.
(*l*) Williams *v.* Owens, 2 Ves. J. 594.
(*m*) Bennett *v.* Wade, 2 Atk. 325.
(*n*) 1 Roll. Abr. 615, (Q. 1.)
(*o*) Sparrow *v.* Hardcastle, 3 Atk. 803.
(*p*) 1 Roll. 615.

not duly executed (*q*), a subsequent devise void in law (*r*), equally operated to revoke. An exception prevailed in the case of a partition, if the object extended no farther; but the slightest addition thereto, as a power of appointment prior to the limitation of the uses, amounted to a revocation (*s*). The same rule obtained in equity with regard to equitable estates. Thus, if after devising an estate, the testator entered into a contract to sell it, though the contract was rescinded after his death (*t*); or if, having contracted to purchase, he devised his interest in the estate, and afterwards took a conveyance different from that which he could have enforced under the contract, as to himself and a trustee to bar dower, the devise was revoked (*u*).

With the single exception above noticed, a court of law could look no farther than to see whether the interest remained the same in the devisor at his death, as at the date of his will; if not, whether the purpose was general or partial, whether by way of charge or not, it was a revocation. In equity, however, if the conveyance were not purely voluntary, as if made for charges, or incumbrances, or to pay debts, and it went no farther than the particular purpose required, it was only a revocation *pro tanto* (*x*), unless made to the devisee himself (*y*). So, if the same estate and interest remained in the testator, subject to the same disposition, though changed as to the legal or equitable quality, as where, in pursuance of marriage articles, he covenanted to convey to certain uses, with an ultimate remainder to his

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(*q*) Ex parte Ilchester, 7 Ves. 374.
(*r*) Roper *v.* Constable, 8 Vin. Ab. 141.
(*s*) Knolys *v.* Alcock, 7 Ves. 558.
(*t*) Bennett *v.* Earl Tankerville, 19 Ves. 171.
(*u*) Ward *v.* Moore, 4 Mad. 368.
(*x*) Brain *v.* Brain, 6 Mad. 221; Earl Temple *v.* Dr. Chandos, 3 Ves. 685.
(*y*) Harkness *v.* Bailey, Prec. Ch. 514.

right heirs, the testator, after devising upon condition that he should have no issue, conveyed the estate to trustees to the uses and trusts of the articles, it was held that the will was not revoked (*z*).

In the case of personal property, the law leant against considering a legacy as specific. Where it was clearly so, it seemed to have been established as a rule that the only inquiry to be made was whether the specific thing remained *in esse* at the death of the testator, and the Court would not entertain the question whether it had or had not ceased to exist by an intention to adeem on the part of the testator (*a*).

This enactment carries out the principle contained in the preceding sections. As no presumption is to operate against an existing will, neither is it to affect a particular disposition in it. However, therefore, the testator may deal with or modify the property after making his will, if he have any interest at all in it at his death, the devisee or legatee will take it, unless the whole will be revoked.

A will shall be construed to speak from the death of the testator.

XXIV. And be it further enacted, that every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

The preceding section points to cases where, notwithstanding his dealings with the property which was the subject of disposition, the testator had some interest remaining in it at the time of his death.

(*z*) Williams *v.* Owens, 2 Ves. J. 594

(*a*) See Stanley *v.* Potter, 2 Cox, 180.

The present enactment extends to after-acquired property, both real and personal, and its operation will be very important.

A gift of lands, either from the words of the statute of wills, "persons *having* lands may devise them," or because a will was considered in the nature of a conveyance, even a general residuary devise was specific, and passed only that which the testator had at the time of making it. No after-acquired estate, though only a foreclosure of a mortgage, was affected by the will (*b*). But all chattel interests, as well real as personal, which he possessed at the time of his death, passed under appropriate words of disposition. Thus, if a testator devised all his real and personal estate, and afterwards acquired more of each kind, the real estate acquired afterwards did not pass, but leases or other personal estate did (*c*). As to real property, therefore, the will was invariably construed to speak from its date; and so in case of a specific bequest of personalty; but as to the general personal estate, the rule was laid down in unqualified terms, that a will spoke from the death of the testator.

It has been observed, that the leaning of the Courts was invariably against construing a legacy to be specific, because, if the particular thing was not in being at the time the will took effect, the legacy failed. In the case of a bequest in general terms, some particular expression was necessary which clearly and unequivocally pointed to the present time as descriptive of the things intended to be given. "All the leases which I *now* have,"—"all the horses *now* in my stable,"—"all the corn *now* in my barn," would not pass leases, horses, or corn, after purchased; but where the bequest was of a collective body, as a "flock of sheep in such a

(*b*) Casborne *v.* Scarfe, 1 Atk. 605.
(*c*) Wind *v.* Jekyll, 1 P. W. 572.

field," or "my library of books," things in their nature fluctuating, any addition to the one or the other would have been included in the devise (*d*). In this respect there seems to be no alteration.

By the present section, wills both of realty and personalty are put upon the same footing. A devise of Black Acre estate will pass not only those lands which composed the estate at the date of the will, but all which have been subsequently annexed to it, and a general devise of all lands will of course include all which the testator was seised of at his death.

In the case of a specific bequest, if the testator dispose of the thing given, and purchase another answering the same description, the latter will now pass. Many questions, arising from the subsequent renewal of leases, will be put to rest by this enactment.

It must be observed, that the will speaks from the death only in respect of the *property* comprised in it; the statute leaves untouched questions turning on the identity of person. Where the devise or bequest is to a designated individual, whether by name, as A. B., or by description, as "my son John," it will still be considered as speaking from its date, so as to entitle the person to whom that name or description then applied, not the person to whom it might, in consequence of some change of events, be applicable at the death of the testator. Nor does it extend to questions of satisfaction. If, subsequently to a bequest of a sum of money to a child, the testator give that sum as a marriage portion, the date of the bequest will still be referred to to show that nothing is payable.

A residuary devise shall include

XXV. And be it further enacted, that unless a contrary intention shall appear

(*d*) Wind *v.* Jekyll, 1 P. W. 572.

by the will, such real estate or interest therein as shall be comprised or intended to be comprised in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

estates comprised in lapse and void devises.

A residuary bequest of personal estate operates upon every thing which the testator possessed at the time of his death, and which turns out not to be disposed of by his will, whether it be by omission, or the lapse of specific bequests, void or failing by the previous death of the legatee (*e*). But as every devise of land was specific, a residuary devisee could take no more than the testator was seised of at the date of his will, and which was not therein *expressed* to be devised (*f*). Consequently, all which could not vest in the devisee, devolved on the heir (*g*). But if only a partial or contingent (*h*), or reversionary (*i*) interest was specifically devised, the estate which the heir would otherwise have taken, would be included in the residuary devise.

The operation of this clause will be to carry to the residuary devisee all the real estate upon which the specific devise could not operate, unless it appear by the will that the testator intended his heir to take it.

(*e*) Brown *v.* Higgs, 4 Ves. 708.
(*f*) Wright *v.* Hall, Fort. 182; Page *v.* Leapingwell, 18 Ves. 463.
(*g*) Wheeler *v.* Waldron, Allen, 28.
(*h*) Goodtitle *v.* Knot, Cowp. 43.
(*i*) Chester *v.* Chester, 3 P. W. 66.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

XXVI. And be it further enacted, that a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold, or leasehold estate if the testator had no freehold estate, which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

This enactment also effects an important alteration in regard to the construction of devises. Formerly, neither copyholds (unless surrendered to the use of will), nor leaseholds, would pass under a general devise of "lands, tenements, and hereditaments," or other general words descriptive of real estate, unless the devisor had no freehold lands upon which it might operate (*ii*). Since the statute 55 Geo. III. c. 192, dispensed with the necessity of surrenders in certain cases, copyholds have been placed pretty nearly on the same footing as freeholds in regard to the operation of a general devise. But in respect to leaseholds, the rule laid down in *Rose* v.

(*ii*) Byas *v.* Byas, 2 Ves. sen. 164.

Bartlett (Cro. Car. 293) still applied, that "where a man hath lands in fee, and lands for years, and deviseth all his lands and tenements, the fee simple lands pass only, and not the leases for years; but if he hath no fee simple, the lease for years passeth;" and this, notwithstanding that, by reason of a defective execution of the will, the devise was inoperative (*j*). The rule, like all others, was founded on *intention*, which was sought for in the nature of the limitations, or other special circumstances apparent in the will, and if such intention could not be clearly demonstrated, the leaseholds did not pass.

The rule of construction will be now reversed, and the intent to except them must be expressed or clearly collected from the will.

A general gift shall include estates over which the testator has a general power of appointment.

XXVII. And be it further enacted, that a general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in

(*j*) Chapman v. Hart, 1 Ves. sen. 270.

a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

It was never considered necessary in the execution of a power to refer to it in express terms. It was sufficient if the intention to exercise it appeared either by a description of the subject over which the power extended, or by any other means (*k*). If the testator had no other lands, or none in the particular place, or answering the particular description but those included in the power, a general devise, or a devise of lands in such a place, or of such a description, was a good execution, for it could not be intended that he meant to employ words without meaning (*l*). But it was otherwise if he had any other lands which would satisfy the terms of the devise (*m*). The intention to *include* the lands covered by the power must before have been manifested, now it will be presumed.

Probably, therefore, any words capable of comprehending though not expressly descriptive of real estate will suffice for the purposes of this clause, though it was formerly otherwise. In the case of Jones *v.* Curry (*n*), the Master of the Rolls held, that a devise of "all my estate and effects of whatever denomination," though it would carry all the

(*k*) King *v.* Melling, 1 Vent. 214.
(*l*) Standen *v.* Standen, 2 Ves. 589.
(*m*) Ex parte Caswell, 1 Atk. 559.
(*n*) 1 Swanst. 66.

real as well as personal property of the testator if he had had any; yet as it would be satisfied by confining it to property of the latter description, it did not operate as an execution of a power to appoint the former. Admitting the principle of this decision to be correct, and that no intention to execute the power could be collected from those general words, it seems that as the intention is now to be inferred, any words capable of passing real property will suffice.

This rule of construction, however, is to apply only where the testator has a *general* power of appointment. Where the power is a *special* or *limited* one, perhaps the intention to execute it might be collected as before, where there is no reference to the power, either from the descriptive language of the will, or the circumstances of the testator's property.

But in the latter case there may be a difficulty in determining from what period the will is to speak. Suppose the testator being, at the date of the will, seised in fee of lands in the parish of A., and having a *special* power of appointment over other lands in the same parish, makes a devise of all his lands at A., which might, if he had no other lands there, be deemed an execution of the power, and afterwards sells the former; if the will is to speak from his death, the latter will pass. If he does not sell them, the former only. Again, if at the time of devising he have only the lands comprised in the power, and subsequently purchase others, the purchased lands only will pass by the devise, otherwise the power will be executed.

But it is clear that in these cases the construction will depend not on the intention of the testator at the time of devising, but on subsequent independent events. The will, in effect, will be varied by collateral circumstances, and a devisee be entitled to one estate or the other according as the testator has bought or sold since the making of his will. On the other hand, to make it speak from any other

time it must clearly appear on the *face of the will* that the testator so intended. (Sec. 24.)

It is probable therefore that the effect of these enactments will be to make it necessary to refer specifically to the restricted power, or to point specifically to the property in order to avoid such an inquiry. As future acquired estates may now be devised, the argument that the testator might have given in anticipation of acquiring it, may be applied as well to wills of realty as of personalty. If this be so, a devise of "all my lands in the parish of A." will not pass lands covered by the power, though the devisor has no other lands upon which it can operate.

As to personal property the rule was, that there must be some reference to the power, for as every person must be possessed of some personalty, there was enough to make a general bequest operative without reference to the property comprised in the power, and the court would not, it seems, look into the circumstances of the testator at the time of making his will, for the purpose of collecting his intention (*o*); though the whole of his own estate was exhausted by and inadequate to the payment of the legacies (*p*). He may have given in anticipation of acquiring the property, so that the bequest was not considered to afford any evidence of an intent to execute the power. And according to some authorities it was immaterial that the precise sum over which the power rides was given, and there was no other fund (*q*). But this rule was disapproved of by more than one learned judge, and Lord Eldon said in Nannock *v.* Horton (*r*), that he

(*o*) Jones *v.* Tucker, 2 Meriv. 533.
(*p*) Bennett *v.* Abarrow, 8 Ves. 609.
(*q*) Jones *v.* Tucker, 2 Meriv. 533; Jones *v.* Curry, 1 Swan. 66; 1 Wils. Ch. R. 24.
(*r*) 7 Ves. jun. 391.

was not sure it did not defeat the intention nine times out of ten.

By virtue of this clause a general power of appointment will be presumed to be executed if there are any words applicable to the subject of it, but as to a limited power it seems there must be some reference to it, or the property will not pass.

A devise without any words of limitation shall be construed to pass the fee.

XXVIII. And be it further enacted, that where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

This section introduces a rule of construction which has been an acknowledged desideratum for ages. In obedience to that governing principle of English law, that the heir shall not be disinherited by implication, it has been long settled that a simple devise of lands without words of limitation conferred on the devisee an estate for life only, notwithstanding that the testator might in other parts of the will have evinced an intention to dispose of his whole estate (*s*), or have given a legacy to the heir (*t*), or the property to a class embracing him as children (*u*), or have immediately before devised an estate expressly for life, implying therefore that he meant something more by an indefinite devise (*x*),

(*s*) Denn *v.* Gaskin, Cowp. 657.
(*t*) Doe *d.* Callow *v.* Bolton, 2 Bl. 1045.
(*u*) Dickins *v.* Marshall, Cro. El. 330.
(*x*) Goodtitle *v.* Edmonds, 7 T. R. 633.

or even have declared a purpose to disinherit him (*y*).

With regard to this rule, it was said by Lord Mansfield (*z*), "I verily believe that in almost every case where by law a general devise of lands is reduced to an estate for life, the intent of the testator is thwarted." However the inclination of the courts in favour of the intention has induced them to lay hold on trivial circumstances to support a contrary construction. Thus a charge, however slight on the devisee in respect of the land, was, in a very early case, held to give a fee by implication (*a*), for otherwise he might be a loser by the devise, as he might die before he could reimburse himself. And the principle applied to every case in which loss was possible. But it was otherwise if the charge was on the land (*b*). Where the devise was to A., with a limitation over in case he died under twenty-one, it was held to afford a presumption that in the alternate event he was to take the whole (*c*). And any words descriptive of the quantity, as "all my estate," "all my interest, &c." would suffice to give a fee.

The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue living at the death.

XXIX. And be it further enacted, that in any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefi-

(*y*) Right *v.* Compton, 9 Ea. 267.
(*z*) Right *v.* Sidebottom, Doug. 734.
(*a*) Wellock *v.* Hamond, Cro. El. 204.
(*b*) Doe *v.* Daw, 3 M. & S. 518.
(*c*) Tomkins *v.* Tomkins, cited in 1 Burr. 334.

nite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Perhaps no expressions usually occurring in wills have given rise to so much litigation as those of the nature contained in the foregoing enactment. Generally speaking, when a testator gives an estate to A. and his heirs, and directs that if A. die without issue it shall go to B., he means that B. shall have it unless A. leave issue living at his death, but not otherwise. But the legal signification of the words, as established by a multitude of cases, was different, and the word "issue" was held to comprise descendants of every degree existing at any distance of time; the consequence of which was, that A. must take an estate tail, in order to give

effect to the supposed intention. And as this could generally be converted into a fee, the effect was to give him an absolute dominion over the property, whether he had children or not. So operative were these words that a devise in fee simple, as in the instance just put, might be cut down, or an estate for life, either constructive or express, enlarged to an estate tail. As a bequest of personal property could not be limited on an indefinite failure of issue, such a construction by rendering void the ulterior disposition gave A. immediately what it virtually gave him when the devise was of realty. To the anxiety of the courts in later ages to avoid rendering the disposition nugatory is to be attributed the many conflicting decisions, and the refined distinctions the books present on this subject. The same words have been held to mean issue living at the death, and issue indefinitely, according as they applied to realty or personalty.

The present enactment is adapted to remove the discrepancy between the legal and the popular signification of such terms. By preventing an estate tail being raised by implication, its operation will be to uphold many bequests of personalty; while it limits or gives a quality to devises more uniformly in accordance with the wishes of the testator.

No devise to trustees or executors, except for a term or a presentation to a church shall pass a chattel interest.

XXX. And be it further enacted, that where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate

of freehold, shall thereby be given to him expressly or by implication.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

XXXI. And be it further enacted, that where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Whether a devise to trustees or executors vests in them any, and if any, what estate in the premises devised, is frequently a question of considerable importance, as well in regard to ulterior limitations of the property, whose validity or operation depends upon its solution, as for the purpose of determining who are the proper parties to deal with the property, and to join in a conveyance of it. It has been long established, though the subject has undergone much learned discussion, that the statute of uses operates as well upon uses created by will as upon those created by deed (*d*); a proposition which is assumed by the two preceding sections. Where

(*d*) Broughton v. Langley, Salk. 679; Popham v. Beaufield, 1 Vern. 79, 167.

the limitation is therefore to the use of the trustee, he takes the legal estate without the aid of any reasoning derived from the nature of the trust (*e*). But in other cases the question was governed by the intention of the testator, as collected from the nature of the trusts. If he had made the intervention of the trustees necessary in the administration of the property, as if they were to raise money by sale or mortgage (*f*), to receive and apply the rents (*g*), or to *permit* a *feme covert* to receive them to her separate use (*h*), they were held to take the legal estate; but not if they were to *permit* and *suffer* any other person than a *feme covert* to receive the rents (*i*). And upon the same principle it was held that the estate remained in them no longer than was necessary for the performance of the trusts. Where the limitation was in trust to pay the surplus rents to A. for life, and after his death to the use of the heirs of his body, it was held that the trustees took an estate for the life of A. only (*k*). Hence it was laid down as a general rule, that trustees took just that quantity of interest which the exigencies of the trust required. It was immaterial whether the testator had used words of limitation in the devise as heirs, executors, &c.; the question was, whether the exigencies of the trusts demanded a fee, or whether they could be satisfied by any, and what less estate (*l*); whether a chattel (*m*), a freehold, an estate for life, with a chattel interest superadded (*n*), or a fee simple, either entire or determinable, was necessary, or would suffice. But a devise to an executor as such generally carried a chattel interest. It is obvious that such a rule of construction was of very difficult application. It

(*e*) Symson *v.* Turner, 1 Eq. Ca. Ab. 383, pl. 1, n.
(*f*) Bagshaw *v.* Spencer, 1 Ves. sen. 142.
(*g*) Silvester v. Wilson, 2 T. R. 444.
(*h*) Harton *v.* Harton, 7 T. R. 652.
(*i*) Right *v.* Smith, 12 Ea. 455
(*k*) Shopland *v.* Smith, 1 B. C. C. 74.
(*l*) Doe *v.* Edlin, 4 Ad. & Ell. 586.
(*m*) Cordall's Case, Cro. El. 315.
(*n*) Doe *v.* Simpson, 5 Ea. 162.

was not easy to determine in whom the fee vested at any given period: and many inquiries into extrinsic circumstances were necessary in the investigation of titles derived from the will. These will be in a great measure saved.

The 30th section operates to prohibit the construction of a chattel interest by implication from the *nature* of the trust. The estate itself or the trust must be limited to a term certain; a devise in trust during the minority of a *cestui que trust* will, it seems, no longer convey a chattel interest (*o*), nor to pay debts and legacies (*p*), nor to raise a sum of money (*q*); but in all these cases the trustees will take the whole fee simple. No implication will arise from the use of words of limitation, as heirs, executors, &c. which, if inconsistent, will be rejected.

The devise being thus construed to *pass* the fee (unless the estate be limited as above stated), the 31st section carries out the principle by providing that it should *continue* in the trustee, notwithstanding the trusts having expired. Formerly the courts, in their anxiety to restrict the estate of the trustees to the requirements of the trust, held, that where the latter extended beyond the life of the beneficial devisee, a chattel interest might be superadded to the estate *pur autre vie*, if consistent with the purposes of the trust (*r*). So where it was necessary that the fee simple should pass, it might be determined when the trusts were satisfied. In future the mere inspection of the devise will inform a purchaser in whom the legal estate resides.

There seems to be some repugnancy in the words "without any *express* limitation," as compared with the terms of the preceding section. By that section

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(*o*) See Water *v.* Hutchinson, 1 B. & C. 721.
(*p*) See Cordall's Case, Cro. El. 315.
(*q*) See Doe *v.* Simpson, 5 Ea. 162.
(*r*) Ibid.

it seems that an estate for years, as well as an estate of freehold, might be raised by implication. Thus a devise to A. in trust, to accumulate the rents and profits for twenty years, and then to the use of B. in fee, would give A. a chattel interest only; while a trust to pay the rents to a feme covert for her separate use for life, with remainder over, would vest in him an estate *pur autre vie*. But the wording of the 31st section would seem to exclude the former construction. Of course these enactments will not in any way affect a mere naked power to sell, given to a trustee or executor.

Devises of estates tail shall not lapse.

XXXII. And be it further enacted, that where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

XXXIII. And be it further enacted, that where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime

of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

These enactments effect a very salutary change in the law of devises, by which, in conformity with the Roman law, the devise was void if the devisee was not in being at the time when the will took effect; consequently, if the donee in tail died during the life of the testator, none of his issue could take, and the remainder came at once into possession. The former section extends to all devises; the latter is confined to the children (legitimate) or other issue of the testator, and though in terms it is confined to immediate devisees and legatees, probably it will receive a liberal construction so as to extend the benefit to *cestui que trusts*.

Leaving issue.]—It seems a child in *ventre sa mere* will be included (*s*).

Any such issue.]—Not merely the issue so left; the words probably refer to "a child or other issue" mentioned in the first part of the sentence, so that it will comprise the descendants of those who shall be left.

As if the death of such person had happened immediately after the death of the testator.]—An important inquiry will arise on these words, whether the issue will take as substituted legatees, or devisees, or by representation; in the case of realty, whether by

(*s*) Doe *v.* Clark, 2 H. Bl. 399.

descent or purchase. It should seem that they take by representation, and not as if the gift had been made to them, and that the property will not be affected by the will of the devisee or legatee; for the third section, which extends the power of disposition over all "contingent, executory, or other future interests," seems to point only to estates already created, or in being at the time of his death, but which are not and may not become vested in the testator—where the contingency is as to the person who, or the happening of the event upon which he, will be entitled under existing limitations. Hence personal property will go to the executor or administrator of the deceased issue, and be distributable according to the statute, while estates of freehold will descend upon the heir.

Act not to extend to wills made before 1838, nor to estates pur autre vie of persons who die before 1838.

XXXIV. And be it further enacted, that this act shall not extend to any will made before the first day of January one thousand eight hundred and thirty-eight, and that every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and that this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January one thousand eight hundred and thirty-eight.

The execution of a codicil, referring to the will, operates as a republication of the will, though it be

not so expressed; the testator's acknowledgment of his former will, considered as his last will at the time of making the codicil, is implied from the nature of the instrument itself, and the attestation of the latter becomes therefore an attestation of such acknowledgment (*l*). The effect was to draw down the language of the will to the date of the codicil, and hence it operated to pass after-acquired property, if the terms of the devise were comprehensive enough to include it.

The operation of a codicil, executed after the 1st January, will be important. It will probably render void the will of an infant; will subject the whole to a revocation by marriage, and relieve it from all presumptive revocations; deprive the heir of lapsed devises, and give them to the residuary devisee; prevent the lapse of others, besides rectifying imperfect executions of powers of appointment, enlarging to a fee a devise which would otherwise have been for life only, cutting down others, and subjecting the most important parts of the will to a construction entirely different from what they would otherwise have received.

It seems also that a will, or a particular disposition which has been revoked by any act or dealing, cannot be set up after that date, by a codicil which does not *express* an intention to revive the same. (Sec. 22.) But no interlineation or alteration in the body of the instrument will bring it within the act, unless there be a re-execution of the whole will.

A codicil imperfectly executed after the 1st of January, and which cannot therefore operate to bring the will within the statute, will not, it seems, have the effect of rendering it void. As if a codicil attested by one witness only, be added to an unattested will of personalty, which was good at the time.

(*l*) Pigott *v.* Waller, 7 Ves. 98.

Act not to extend to Scotland.

XXXV. And be it further enacted that this act shall not extend to Scotland.

Act may be altered this session.

XXXVI. And be it enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this present session of Parliament.

APPENDIX.

SUGGESTIONS

AS TO

TAKING INSTRUCTIONS FOR AND PREPARING

Wills and Codicils

AFTER

DEC. 31, 1837.

THE following suggestions may be found useful to the practitioner in taking instructions for and preparing wills and codicils after the 31st December, 1837.

1. The testamentary power extends to, and the will should provide for, all *contingent, executory, and other future interests,* which the testator then has, or may have at the time of his death, in whatever manner he may have acquired them; also to all *rights of entry,* and to all property which he may thereafter acquire, whether fee-simple, freehold, copyhold, customary, or of any other tenure, and whether corporeal or incorporeal, and which he may be entitled to either at law or in equity at the time of his death. Therefore he may devise what another may devise to

him, an expectant heir may devise his expectancy, a joint tenant his chance of survivorship, &c.

2. All estates of copyhold and customary tenure are *directly* devisable in all cases without reference to the custom, whether the testator has been admitted or not, and without any surrender to the use of will, except when the devisor is a *feme covert*, and then a power must be given by surrender as before. But it must be recollected, that her will must be executed with the formalities required by the statute without regard to those which are prescribed by the surrender.

3. With respect to the *property*, every devise will be construed as if made immediately before the testator's death, unless the will manifest an intention to the contrary. Consequently it will be important to ascertain from the testator whether he intends the devisee to take only the *specific estate* as it then exists, or whether the devise is to comprehend any future accessions. If the former, the statutable construction should be guarded against, by the introduction of some words having reference to the *existing state* of the property, or the *time of devising*. Otherwise a devise of "my real estate in the parish or county of A." will pass whatever real estate the testator has in the parish or county at the time of his death, though he might have in the interim sold the one originally

devised, and though the value of the others might far exceed what was intended for the devisee. Of course any provision for after-acquired property will be a sufficient manifestation of such an intention.

4. No words of limitation, as "heirs," &c. will be necessary to pass a fee, though it will be advisable still to employ them; but if any *less estate* be intended to be given, that intention must be shown.

5. A gift to a *child* or *other issue* of the testator, will not lapse by the death of the devisee or legatee in the testator's lifetime, if he leave *issue* to whom the property by the terms of the gift can come. It must therefore be ascertained whether the gift be intended to be *confined* to the *devisee*, and if so, the words "if he survive me," or some others of the like import, must be added.

6. A gift to a *stranger*, or to any other person than the testator's legitimate issue, will still lapse as before, by the previous death of the devisee or legatee; and if the devise or bequest be meant to extend to *his issue*, it must be so expressed. A declaration that it shall not lapse, will not suffice; there must be a *gift* over.

7. All lapsed devises will go over to the residuary devisee, and not as before to the *heir*, un-

less an *intention* to the contrary *appear* by the will.

8. Devises *in tail* to *any person* will take effect on behalf of the *issue*, though the *devisee* in tail die before the testator. If it be intended *not* to take effect, that intention must be expressed. It is not probable that this precaution will be often needed.

9. Where the testator has leasehold or copyhold, or customary estates as well as freehold, and he intends to devise the whole, it will not be necesssary, though still advisable, to mention the nature of the tenure; but if he means to give one and not the other, the devise should point specifically to the subject.

10. Property of every description over which the testator has a *general* power of appointment, will be deemed included in a general devise or bequest, or in any descriptive devise or bequest which may apply to the subject of the power, though there be no reference to the power. Where this is intended, it will be still advisable, however, to refer to the power. But where it is *not* intended, the will must *show* that the devise is not meant to be an execution of the power.

11. Where a testator has only a *special* or *limited* power which he wishes to execute, it will

be necessary, as before, either to refer to it in terms, or to describe specifically the property, so that the intention to execute the power may plainly appear.

AS TO THE EXECUTION, REVOCATION, &c.

12. Every will and codicil must be signed at the *foot or end thereof* by the testator, or by some *other person in his presence*, and by *his direction*. Sealing will be unnecessary for any purpose. If the testator is not able to sign his name, he may make his mark. The third person should sign the testator's name, and the will should express that he does so in the presence and by the direction of the testator. Though one signature of the testator at the end is sufficient, the better way will be, when the will consists of more than one sheet, to sign each.

13. Such signature must be *made* or *acknowledged* in the presence of *two* witnesses *present at the same time*.

14. No *publication* is necessary in any case.

15. No person *to whom*, or to *whose wife or husband*, the will gives any thing, should be a witness, or the gift will be void.

16. The witnesses must *subscribe* their names to the will in the *presence* of the *testator*. The act

does not require that they shall sign in the presence of each other, but it will be safer to do so, and before they leave the testator's presence at all. They should sign each sheet, if more than one, and put their initials opposite any erasure or other alteration. Witnesses who cannot write may make their mark.

17. The statute declares (sect. 9) that no *form of attestation* shall be necessary. The mere names of the witnesses will suffice, though it will be advisable to write an attestation that the witnesses may be apprised of what is required of them. The attestation may be in this form:—"Signed by the testator A. B. in the presence of us, present at the same time, who in his presence, at his request, and in the presence of each other, have hereunto set our names as witnesses thereto.

C. D.
E. F."

If the signature be made by a third person, the attestation may be thus:—

"Signed by G. H., by the direction and in the presence of the testator," or "Acknowledged by the said testator to have been signed by his direction, and in his presence, by E. F., in the presence of us," &c.

18. No power of appointment can be executed by will but in the above form, and every will so executed will be a good execution of the power,

notwithstanding that other ceremonials may be prescribed.

19. Every alteration, whether by obliteration, interlineation, or otherwise, must be executed as above mentioned, or it will have no effect, except it renders the original words illegible. But the signature and subscriptions may be made in the *margin*, or in *some other part* of the will *opposite* or *near to* such alteration, or at the *foot* or *end* of or *opposite* to a *memorandum referring* to such alteration, and written at the *end* or *some other part* of the will. The memorandum may be in this form:—

"The words written between the 5th and 6th line of the second sheet, and the words written on an erasure on the 7th line, and the obliteration between the words on the 8th line, were severally inserted and made by me, this day of .

A. B.

"The above memorandum was signed by the above-named A. B. in the presence of us present" &c.

20. In order to revoke a will or codicil, the testator must either execute another will or codicil, or simply a declaration in writing of his intention to revoke the same, which must be executed with the same formalities as a will; or he must *burn*, *tear*, or do some other act to *impair* the *substance* of the will, with the intention of revoking

it. As to a particular disposition in the w
though the 20th section declares that no will
codicil, or any part thereof, shall be revoked exc
by one or other of these acts, it seems by the 2
section that a whole devise may be revoked by
obliteration properly executed and attested.

21. The mode of reviving a will or codicil, or a
disposition in either, which has been once
voked, is either by re-executing the instrument
part revoked, as before directed, or by a codicil
executed, which *shows an intention* to revive
same. And if the revocation occurred part at
time and the rest at another, the clause of re-e
cution or the codicil must express how much i
intended to revive, otherwise it will not revive
part which was first revoked.

AS TO WILLS MADE BEFORE THE 1st JAN. 1

22. If a devise in an old will be struck out,
any other cancellation made, it will afford
dence of an intention to revoke that part as befc
but it must not be executed unless it be inten
to bring the whole will within the act. There
two modes by which this might be done; 1st.
re-execution; 2d. By the execution of a codi
Considering the important consequences wh
will follow, it will perhaps in almost every insta
be advisable to make a new will, rather than s
ject one, framed with a view to so different a s
of the law, to the operation of the new stat
The will of an infant, in particular, should no
touched.

INDEX.

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